Supreme Court, U.S.
FILED

97-15 APR 10 1997

OFFICE OF THE CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

LLOYD E. DAWSON, JR.,

Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

On Petition for Writ of Certiorari
to the
United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is it wrong for the Tax Court and the Fifth Circuit to rely on the precedent of a clearly erroneous, but unchallenged, prior Tax Court decision, Johnson v. Commissioner, 72 T.C. 340 (1979)?

2. Texas criminal law states that a thief never acquires title to the stolen property. Can the nature of stolen property become community property if the perpetrator has possession, but not title to it?

3. Does the credibility of witnesses matter in American jurisprudence, or does the Court without regard to facts, impute one spouse's felony to the other spouse?

PARTIES TO THE PROCEEDINGS

The names of all parties to the proceedings in the Court of Appeals whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of petitioner to be listed.

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OPINIONS BELOW

The unpublished opinion of the Court of Appeals for the Fifth Circuit in cause number 96-60292, Commissioner of Internal Revenue v. Lloyd E. Dawson, Jr., appears in Appendix A. The decision of the United States Tax Court for the year 1988 (Docket No. 14892-92) appears in Appendix B. The decision of the United States Tax Court for the year 1989 (Docket No. 10613-93) appears in Appendix C. The Memorandum Opinion of the United States Tax Court relating to this case appears in Appendix D.

STATEMENT OF JURISDICTION

The Court of Appeals' Opinion in this matter was filed on January 10, 1997. A Petition for Rehearing was not filed. This Court's jurisdiction is invoked under Title 28, U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

26 U.S.C. Section 6013(e) - Innocent Spouse Relief; Texas Family Code Ann. Section 5.01 et.seq. (Vernon 1993) - Community Property; Texas Penal Code Section 31.03(a) (Vernon 1994) - Theft.

STATEMENT OF CASE

This is an appeal from the United States Court of Appeals for the Fifth Circuit's affirmance without opinion (Local Rule 47.6) of two United States Tax Court decisions which were consolidated for the purposes of trial. After a bench

trial on October 5, 1994, the Tax Court found that the funds embezzled by the Petitioner's wife during 1988 and 1989 constituted community property. The Court further found that the Petitioner was not entitled to innocent spouse relief for the year 1988 and, therefore, was responsible for income tax on one-half of the embezzled funds.

During the 1988 and 1989 taxable years, Petitioner was married to Katy Dawson and was employed by Gulf States Utilities as a control operations foreman. During all of 1988 and the first seven months of 1989, Katy Dawson was employed as an accountant by Beaumont Home Health Services (hereinafter "BHHS") and Port Arthur Home Health Service (hereinafter "PAHHS"), two home health care companies owned and operated by Ruth Constant. While employed by BHHS and PAHHS Katy Dawson had signature authority for, and was authorized to issue checks from, each of the business checking accounts. However, Katy Dawson did not have authority to write irregular checks to herself, i.e., checks outside the normal course of the business of BHHS and PAHHS.

During the 1988 and 1989 taxable years Katy Dawson embezzled $153,726 and $95,072, respectively, from the companies by writing checks from their bank accounts to herself. On July 8, 1991, Katy Dawson pled guilty in the United States District Court, Eastern District of Texas, to one count of embezzlement, in violation of 18 U.S.C. Section 666, and one count of income tax evasion for the tax year 1988,

in violation of 26 U.S.C. Section 7201. Katy Dawson was sentenced to federal prison for 28 months. In addition she was ordered by the District Court to pay $124,000 in restitution to Ruth Constant and to pay all the taxes to the IRS for the tax year 1988. Petitioner and Katy Dawson filed a joint tax return for the tax year 1988; a return which Katy Dawson had fraudulently altered and to which she signed Petitioner's name. Petitioner on advice of counsel filed a separate return for the tax year 1989.

Following Katy Dawson's conviction, the IRS determined that the funds embezzled by Katy Dawson constituted community property under Texas law and that, accordingly, one-half of the said funds were taxable to the Petitioner. As discussed more fully herein, Petitioner had little to no involvement in the financial affairs of his marriage and believes that the IRS determination was flawed by reliance upon a erroneously-decided prior United States Tax Court case.

REASONS FOR GRANTING WRIT

Certiorari should be granted for three reasons: This Petition presents an issue based on a case which contains erroneous conclusions which are not supported by the authority cited; the Opinion below conflicts with Texas Criminal Law as well as with previous decisions of the Texas courts and other Circuits; and the opinions below have so far departed from the acceptable and usual

course of judicial proceedings as to call for an exercise of this Court's power of supervision.

1.

The Tax Court's opinion in Johnson v. Commissioner, 72 T.C. 340 (1979)[Appendix E] shows a fatal conflict in its interpretation of Texas law. The Johnson case was not appealed. Legal determinations are subject to de novo review. NCAA v. Commissioner, 914 F2d 1417, 1420 (10th Cir. 1990).

In Dawson, the Tax Court relied heavily upon Johnson for the proposition that, because Katy Dawson had authority to sign checks in the course of her employment as an accountant with BHHS and PAHHS, Ruth Constant thereby intended to pass both possession and title to all the funds to Katy Dawson, even those she stole. The Court in Johnson goes into a lengthy discussion of Texas community property law and concludes correctly that "....whether title to such property passes to the illegal taker depends on whether the owner intended to pass both possession and title to the illegal taker." Id. at 344. To support this position it cites DeBlanc v. State, 37 S.W. 2d, 1024 (1931) [Appendix F].

The Tax Court found that in DeBlanc that title did not pass to DeBlanc because he had made false representation concerning the money obtained from the Austin National Bank, Id. at 1027 and Johnson v. Commissioner, 72 T.C. 340, 345

& 346 (1979). Yet in Johnson, the Court ruled that title did pass to the illegal taker because of the false representation made to the Government, Id. at 346.

The Johnson Court ruled that both possession and title of the stolen funds passed to the thief. The Court misinterpreted Texas law, then, as did the Tax Court in the Dawson case by relying upon the precedent set in Johnson. Accordingly, the Tax Court's assessment of the 1989 taxes to Petitioner on the grounds that the embezzled funds could be community property is erroneous, and should be reversed.

In Johnson, supra, the Petitioner's husband was involved in a scheme of obtaining fraudulent income tax refund checks from the Internal Revenue Service. An Internal Revenue Service employee, who was responsible for processing refund claims, used her position to authorize payments of fraudulent refund claims. Some of the refund checks were issued to fictitious taxpayers and deposited by Mr. Johnson in various bank accounts set up in the names of fictitious taxpayers. Other refund checks were issued in the names of Mr. and Mrs. Johnson. Mrs. Johnson became aware of this scheme prior to the time she filed her 1973 income tax return. Id. at 343.

The present case does not have any of the relationships which are similar to Johnson. It is undisputed that Lloyd Dawson did not know of his wife's embezzlement, and the tax returns for 1988

and 1989 were both filed prior to the date that Petitioner learned of his wife's embezzlement. In addition, it is undisputed that Ruth Constant never gave Katy Dawson permission to make any unauthorized disbursements or to steal from her. Because no title passed to Katy Dawson, no property obtained by her could be converted to community property simply by depositing the funds into a joint checking account. Moreover, DeBlanc v. State, 37 S.W. 2d 1024 (1931), which was cited by the Johnson court, reached the opposite result from the Johnson opinion.

2.

Legal determinations by the Tax Court are subject to de novo review. NCAA v. Commissioner, 914 F. 2d 1417, 1420 (10th Cir. 1990). Under Texas law, the classification of separate or community property is determined at the inception of title, (that occurs when a party first has a right of claim to the property by virtue of which title is finally vested.) Wierzchula v. Wierzchula, 623 S.W.2d 730, 731-732 (Tex. Civ. App. - Houston [1st Dist.] 1981, no writ); Saldana v. Saldana, 791 S.W.2d 316, 319 (Tex. App. - Corpus Christi 1990, no writ); Parnell v. Parnell, 811 S.W.2d 267, 269 (Tex. Civ. App. - Houston [14th Dist.] 1980, no writ). Therefore, unless Katy Dawson obtained a legal title to the funds which she embezzled from Ruth Constant's companies, the embezzled funds do not constitute community property.

According to Texas law, theft is defined as the unlawful appropriation of property with intent to deprive the owner of the property. Texas Penal Code Section 31.03(a)(Vernon 1994). To sustain conviction for embezzlement, title to the embezzled property must be in the injured person (the owner) when the offense is committed. Villareal v. State, 385 S.W.2d 248 (Tex. Crim. App. 1964) [emphasis added]. Therefore, it is axiomatic that, if the injured person (the owner) intended to pass legal title to the thief, no embezzlement occurred.

The Tax Court has incorrectly determined under Texas law that Katy Dawson's 1989 embezzlement income was community property. The key question is whether the taxpayer's wife "acquired" the embezzled income. In order to acquire that property, the spouse in possession must take legal title, Wrightsman v. Commissioner, 111 F.2d 227, 228 (5th Cir. 1940). To determine if a person acquired legal title to property it is necessary to look to the Texas Penal Code to find the answer, not to the Texas Family Code. It is impossible in the State of Texas for a thief to acquire title to property, Section 31.03, Texas Penal Code (Vernon 1994). Further, the appropriation of property is unlawful if it is without the owner's effective consent, Id. at Section 31.03(b)(1). Ruth Constant (the owner) testified that she gave no consent, and that Katy Dawson had no authority, to make any unsupported or illegal disbursement of the funds entrusted to her.

Possession, or the right to possess, may often co-exist with legal title, but the terms in a legal sense are never synonymous, Crenshaw v. Swenson, 611 S.W.2d 886,890 (Tex. Civ. App. - Austin 1980 ref. n.r.e.).

Texas law is abundantly clear that when funds are embezzled no title passes, Gibson v. State, 214 S.W. 341 (1919); Akers v. Scofield, 167 F.2d 718, 719 (5th Cir. 1948). Therefore, Katy Dawson may have acquired possession, but she acquired no title to the proceeds of the embezzlement. She was then powerless to change the character of the stolen property to community property. This interpretation is supported by the Fifth Circuit in Adame's Estate v. Commissioner of Internal Revenue, 320 F.2d 811, 814 (5th Cir. 1963) [school district official and authorized check signer who embezzled could not pass title to the money] and in Wrightsman v. Commissioner, 111 F.2d 227, 228 (5th Cir. 1940) [title passage depends on intention of property owner and taker must acquire legal title before the property will be characterized as community].

Texas Courts have consistently held that the innocent spouse (the Petitioner) is not liable for the thefts of his spouse. Such was the case in 1985 when the Dallas Court of Appeals failed to hold the husband liable for his wife's embezzlement, Curtis Sharp Custom Homes, Inc. v. Glover, 701 S.W.2d 24 (Tex. App. - Dallas 1985 ref.n.r.e.)

The Tax Court incorrectly held that Katy Dawson's act of depositing embezzled income into a joint bank account changed the character of that property from separate to community. This is not the law in the State of Texas. The Tax Court's decision must be reversed.

3.

Justice dictates a reversal in this case. At trial, Petitioner testified on his own behalf, as did Ruth Constant, Shirley Schaefer, and F.B.I. Agent Mary Meaux. However, rather than believing these witnesses, the Tax Court totally disbelieved them and instead believed the testimony of Katy Dawson, a convicted felon, as well as the biased witnesses Jeannie LaPoint and Audrey Dupree. Audrey Dupree and Jeannie LaPoint are the mother and sister, respectively, of Petitioner's former wife, convicted felon Katy Dawson. The evidence before the Tax Court illustrated that both Mrs. LaPoint and Mrs. Dupree had benefitted from Katy Dawson's generosity with the funds that she embezzled from Ruth Constant. The Tax Court found that Lloyd E. Dawson, Jr., knew or had reason to know of Katy Dawson's embezzlement, thereby taking him outside the purview of the innocent spouse provision of 26 U.S.C. Section 6013(e) of the Internal Revenue Code. This factual finding by the Tax Court is clearly erroneous.

Factual findings of the Tax Court are reviewable under the "clearly erroneous" standard. First Nat. Bank in Albuquerque

v. C.I.R., 921 F.2d 1081, 1086 (10th Cir. 1990).

Testimony at the time of trial indicated that the Petitioner and Katy Dawson's marriage was deteriorating in 1988 and 1989. Petitioner worked the night shift while his wife worked during the day. In 1989, because of constant telephone annoyance of bill collectors, Petitioner moved out of the house so he could get sleep during the daytime. The Petitioner was not aware of the total money being spent by his wife, Katy Dawson; the only competent testimony at trial was that Katy Dawson never consulted her husband prior to making costly purchases for herself and her relatives; he did not see or sign the fraudulent 1988 Federal Income Tax return prepared by his wife; and his lifestyle was clearly within his perceived income level.

The Tax Court disregarded all of its own precedents as well as those of the Circuit Courts of Appeal when it came to the conclusion that Lloyd Dawson was not entitled to innocent spouse relief. Hepler v. Commissioner, T. C. Memo 1990-490, states that it is acceptable to believe one's spouse even if she is a liar, and it is not necessary for the husband to participate in the couple's business affairs. Kieffer v. Commissioner, T. C. Memo 1990-612, points out that when a husband does not participate in the couple's financial affairs and is unable to manage money well, he would not be alert to his wife's embezzlement. Klimenko v. Commissioner,

T.C. Memo 1993-340 concluded that, although the husband was involved in the family financial affairs, the wife was "independent" and "very secretive and deceitful" with regard to her financial affairs. In light of the wife's behavior without consulting her husband on purchases or debts, the husband "was in an unfortunate situation that was beyond his control" and he was entitled to innocent spouse relief. Kistner v. Commissioner, 12 F.3d 1035 (11th Cir. 1994), stands for the proposition that an innocent spouse relief is available despite an affluent lifestyle. The Court there noted that the wife had been living well for many years and would not have noticed any sudden lifestyle change. Resser v. Commissioner, 74 F.3d 1528 (7th Cir. 1996) stated that it was clearly erroneous to deny the wife the innocent spouse defense on the grounds that a "person of normal intelligence" should have known by looking at the amount reported on the joint income tax return that there was a substantial understatement. Further, it said the Tax Court committed clear error in considering the spouse's generally lavish lifestyle rather than considering any substantial unexplained increase in that lifestyle.

The Petitioner testified that he had little interest in the financial matters of the marriage, leaving the bookkeeping and banking decisions to his wife and/or mother-in-law.

The Petitioner testified that he occasionally opened bank statements but was unable to decipher them because he had

no formal accounting training. Petitioner also never kept any type of check register prior to March, 1989. The evidence before the court shows that the Petitioner wrote checks totaling $12,541.03 during the year 1988.

The Petitioner testified that he had never had a checking account prior to his marriage and that in order to write a check he would have to ask permission of his wife or his mother-in-law. Although his testimony was inconsistent with that of his wife's, it is supported by Katy Dawson's co-worker and sorority sister, Shirley Schaefer. Mrs. Schaefer testified that she was at a sorority meeting with Katy Dawson when Lloyd Dawson telephoned her requesting permission to make a purchase. After that telephone conversation, there was a discussion between sorority members present when Katy Dawson bragged that her husband had to call her to ask her whether or not he could spend money. Katy Dawson also bragged to Ruth Constant that she handled the purse strings and that her husband had no knowledge of the family finances. Ruth Constant is the President and Chief Operating Officer of the corporations from whom Katy Dawson was embezzling.

The Petitioner testified that he believed their combined family income was approximately $100,000 during the year 1988. This is supported by his further testimony that his salary in 1988 was $40,000.00 and Ruth Constant testified that Katy Dawson's salary was $55,200.00. Excluding the amount that his wife

embezzled from her employer, the expenditures made during the year 1988 must be reviewed to determine if they were so egregious that Lloyd Dawson should have been aware of Katy Dawson's embezzlement, or if they were consistent with a combined family income level of $100,000, Resser v. Commissioner, 74 F.3d 1528, 1540 (7th Cir. 1996). The expenditures of which Petitioner knew were consistent with such an income level, therefore Lloyd Dawson had no reason to know of Katy Dawson's embezzlement, nor were there any unexplained increases in the family's standard of living.

In light of the above credible testimony, the taxpayer certainly did not turn "a blind eye" to matters that would have put him on reasonable notice that there was excess unreported income.

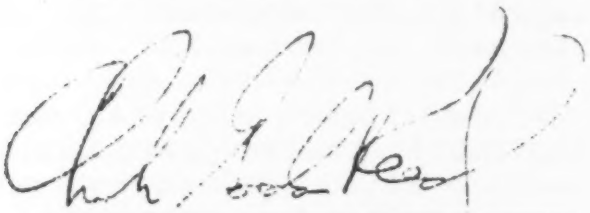
The only remaining question is whether the Petitioner benefitted from the omitted income. The Petitioner withdrew all of his pension from his employer so that he might pay for attorney fees to defend his embezzling wife. The "lavish" home that he shared was subsequently sold, and the Petitioner received nothing from those proceeds. Mrs. Dupree, the taxpayer's mother-in-law, in a legal action, took his two children away from him. Katy Dawson vowed that she would get even with the Petitioner. Editorially speaking, it seems that the Tax Court has joined in this conspiracy. The only conclusion reasonable people can reach is that it would be totally and wholly inequitable to conclude that Petitioner

benefitted from his wife's embezzlement income, or for that matter, from his relationship with Katy Dawson.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment of the Court of Appeals and the judgment and opinion of the United States Tax Court in this matter.

Respectfully submitted,



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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-60292

U.S. COURT OF APPEALS
FILED
JAN 10 1997
CHARLES R. FULBRUGE
CLERK

LLOYD E. DAWSON, JR.,
Petitioner-Appellant,

versus

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

Appeal from the Decision of the United States Tax Court
(10613-93 & 14892-92)

Before HIGGINBOTHAM, SMITH, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:
AFFIRMED. See Local Rule 47.6.[1]

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[1]Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

APPENDIX B

ORIGINAL
28
UNITED STATES TAX COURT

LLOYD E. DAWSON, JR.,
Petitioner,
v.) Docket No. 14892-92
COMMISSIONER OF
INTERNAL REVENUE,
Respondent)

DECISION

Pursuant to the opinion of the Court filed March 4, 1996, and the agreement of the parties in this case, it is

ORDERED AND DECIDED: That there is a deficiency in income tax due from the petitioner for the taxable year 1988 in the amount of $57,984.00;

That there is an addition to tax due from the petitioner for the taxable year 1988, under the provisions of I.R.C. § 6653(a), in the amount of $40.00; and

That there is an addition to tax due from the petitioner for the taxable year 1988, under the provisions of I.R.C. § 6661, in the amount of $14,051.00.

/s/ Thomas B. Wells
Judge.

Entered: APR 8 1996

* * * *
SERVED APR 8 1996

Docket No. 14892-92

It is hereby stipulated that the Court may enter the foregoing decision in the above-entitled case.

It is further stipulated that the petitioner agrees to the foregoing decision without prejudice to the right of appeal.

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APPENDIX C

ORIGINAL

UNITED STATES TAX COURT

LLOYD E. DAWSON, JR.)
Petitioner)
v.) Docket #10613-93
COMMISSIONER OF)
INTERNAL REVENUE)
Respondent)

DECISION

Pursuant to the opinion of the Court filed March 4, 1996, and the agreement of the parties in this case, it is

ORDERED AND DECIDED: That there is a deficiency in income tax due from the petitioner for the taxable year 1989 in the amount of $14,202.00;

That there is an addition to tax due from the petitioner for the taxable year 1989, under the provisions of I.R.C. § 6651(a), in the amount of $1,445.00;

That there is an addition to tax due from the petitioner for the taxable year 1989, under the provisions of I.R.C. § 6654, in the amount of $922.00; and

That there is an addition to tax due from the petitioner for the taxable year 1989, under the provisions of I.R.C. § 6662(a), in the amount of $2,840.00.

/s/ Thomas B. Wells
Judge.

Entered: APR 8 1996

* * * *
SERVED APR 8 1996

Docket No. 10613-93

It is hereby stipulated that the Court may enter the foregoing decision in the above-entitled case.

It is further stipulated that the petitioner agrees to the foregoing decision without prejudice to the right of appeal.

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APPENDIX D

T.C. Memo. 1996-96
UNITED STATES TAX COURT

LLOYD E. DAWSON, JR., Petitioner v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent

Docket Nos.14892-92, 10613-93.[1]

Filed March 4, 1996.

Charles Gordon Reed, for petitioner.

Steven M. Diamond and Wanda Cohen, for respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

WELLS, Judge: Respondent determined the following deficiencies in, and additions to, petitioner's Federal income taxes:

		Additions to Tax		Penalty		
Year	Deficiency	Sec.6651(a)(1)	Sec.6653(a)(1)	Sec.6654	Sec.6661	Sec.6662(a)
1988	$57,984	-0-	$40	-0-	$14,051	-0-
1989	14,202	$1,445	-0-	$922	-0-	$2,840

[1]These cases, hereinafter referred to as the instant case, have been consolidated for purposes of trial, briefing, and opinion.

After concessions, the only issues remaining for decision are: (1) whether petitioner is entitled to "innocent spouse" relief from liability for the understatement of tax attributable to funds his former wife Katy Dawson embezzled during 1988; and (2) whether funds embezzled by Ms. Dawson during 1989 constitute community income, one half of which is taxable to petitioner.

FINDINGS OF FACT

Some of the facts have been stipulated for trial pursuant to Rule 91.[2] The parties' stipulations are incorporated in this Memorandum Opinion by reference and are found accordingly. General Background

At the time of the filing of the petitions herein, petitioner resided in Orange, Texas.

From September 1972 through January 1982, petitioner was employed by the U.S. Navy and, from January 1982 through February 1994, was employed by Gulf States Utilities as a power plant operator and control operations foreman.

Petitioner married Ms. Dawson on October 16, 1982, and the marriage

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[2]Unless otherwise indicated, all Rule references are to the Tax Court Rules of Practice and Procedure, and all section references are to the Internal Revenue Code in effect for the years in issue.

continued through the years in issue. Petitioner and Ms. Dawson had two daughters who lived with them during the years in issue.

Bank Accounts Maintained and Certain Borrowing by Petitioner and Ms. Dawson

During the years in issue, petitioner and Ms. Dawson maintained a joint checking account with Mid County Teachers Credit Union, Port Neches, Texas (Mid County Teachers), for which both petitioner and Ms. Dawson had signature authority and on which petitioner wrote checks. Petitioner and Ms. Dawson maintained a joint account with Texaco Port Arthur Works Employees, Federal Credit Union, Port Arthur, Texas (Texaco P.A.W.). Ms. Dawson was primary account holder and petitioner was joint owner of the account, which included a joint savings account and a joint checking account.[3] Both petitioner and Ms. Dawson had signature authority for the joint checking account, and petitioner wrote checks on the account. Petitioner and Ms. Dawson maintained another joint account with Texaco P.A.W. Petitioner was primary account holder and Ms. Dawson was joint owner of the account. Petitioner, Ms. Dawson, and Pauline Dupree, Ms. Dawson's mother, had signature authority for the joint account.

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[3]Although the parties stipulated that the joint account included both a checking and a savings account, they did not further explain that account arrangement.

The statements for the foregoing accounts were mailed to the residence of petitioner and Ms. Dawson. Petitioner opened and looked at some of the statements. Petitioner also knew where the statements were kept at their residence, and he was able to review them whenever he desired.

Beginning March 15, 1989, and continuing thereafter through the remainder of 1989, petitioner and Ms. Dawson maintained a joint checking account with First National Bank of Mid County. Both petitioner and Ms. Dawson had signature authority for the joint checking account. Petitioner wrote checks on the account to pay family bills. The statements for the account were also sent to petitioner's residence. Petitioner reviewed and reconciled the statements.

On October 22, 1987, a home improvement loan from Texaco P.A.W. to petitioner and Ms. Dawson in the amount of $7,520.34 was outstanding. On that date, petitioner and Ms. Dawson applied for and received an additional home improvement loan in the amount of $15,191.69 from Texaco P.A.W. and refinanced the outstanding balance of the earlier home improvement loan. The new balance of the home improvement loan they received on that date thus became $22,712.03.

Facts With Respect to Ms. Dawson's Employers

Ms. Dawson was employed by Port Arthur Home Health Services (PAHHS) and

Beaumont Home Health Services (BHHS) from 1977 until July 17, 1989. The corporations were wholly owned and/or operated by Dr. Ruth Constant (Dr. Constant). During 1988 and 1989, Ms. Dawson was employed by PAHHS and BHHS as an accounting supervisor and was the second person in charge of the corporations after Dr. Constant.

PAHHS and BHHS each operated two different programs, a Primary Care program and a Medicare program. Ms. Dawson had complete authority over the payroll accounting for the programs, including the input of data into the computer systems for the payrolls and the review of the payrolls. Each of the four programs (viz., PAHHS Primary Care, PAHHS Medicare, BHHS Primary Care, and BHHS Medicare) had two checking accounts, a general account and a payroll account, for a total of eight checking accounts. While employed by PAHHS and BHHS, Ms. Dawson had signature authority for, and was authorized to issue checks from, all eight checking accounts and had complete responsibility and full authority for the issuance of all payroll checks by PAHHS and BHHS.

During the middle of 1987, petitioner worked for Dr. Constant as a computer consultant. At such time, petitioner was the sole proprietor of a computer consulting business that included the delivery of computer equipment and the setting up of computerized bookkeeping and

payroll systems.[4] Petitioner installed computer equipment for PAHHS and BHHS and set up their computerized bookkeeping and payroll systems. He also taught the employees of PAHHS and BHHS how to use the systems. such computerized bookkeeping and payroll systems that were set up by petitioner included the four payroll checking accounts and the four general checking accounts maintained by PAHHS and BHHS that are referred to above. Petitioner also installed computers in the offices of other corporations operated by Dr. Constant. During 1988, petitioner also worked as a "handyman" for BHHS, setting up offices and moving boxes and furniture.

During 1988, Ms. Dawson caused checks to be issued to herself from the payroll checking accounts maintained by PAHHS and BHHS for her wages from the corporations in the amounts of $35,903.12 and $33,854.68, respectively. Also during that year, in addition to the checks for her wages, she used the computerized payroll system installed by petitioner to cause checks to be issued to herself from the payroll checking accounts in the amount of $153,726. Ms. Dawson signed each of the checks on behalf of PAHHS or BHHS. Ms. Dawson issued to herself between 13 and 22 payroll checks per month, with the amount of each check ranging from $50 to $1,500. The checks

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[4]Petitioner operated such business from the middle of 1987 through the end of 1989.

were endorsed by Ms. Dawson and were deposited into joint checking accounts maintained by petitioner and Ms. Dawson during that year.

During 1989, Ms. Dawson caused checks to be issued to herself from the payroll checking accounts maintained by PAHHS and BHHS for her wages from the corporations in the amounts of $8,900 and $22,900, respectively. Also during that year, in addition to the checks for her wages, she used the computerized payroll system installed by petitioner to cause checks to be issued to herself from such payroll checking accounts in the amount of $95,072. Ms. Dawson signed each of these checks on behalf of PAHHS or BHHS. The checks were endorsed by Ms. Dawson and were deposited into joint checking accounts maintained by petitioner and Ms. Dawson during that year. Petitioner deposited certain of the checks Ms. Dawson received from PAHHS and BHHS into their joint checking account with First National Bank of Mid County.

Ms. Dawson did not hide from petitioner the funds she had embezzled.

On July 17, 1989, believing that Ms. Dawson had embezzled funds, Dr. Constant fired her.

Expenditures by Petitioner and Ms. Dawson

During September 1987, a new Lincoln Continental automobile was purchased for Ms. Dawson's use. The purchase was financed with a loan of $29,976. During November 1987, petitioner wrote two checks

to Golden Triangle Remodeling totaling $9,700 for the cost of a three-car garage added to their home. On December 29, 1987, petitioner purchased a new Ford Big Bronco automobile. The purchase was financed with a loan of $22,079.28 to petitioner on which payments were made during 1988.

During 1988, petitioner and Ms. Dawson wrote checks totaling $146,752.26 on their joint checking account with Mid County Teachers. Also during that year, petitioner and Ms. Dawson wrote checks or made transfers totaling $145,458.62 from their joint checking account with Texaco P.A.W. Nearly all of the funds deposited into the joint checking account maintained by petitioner and Ms. Dawson with Texaco P.A.W. during 1988 were spent in that year. Between January and April 1988, petitioner and Ms. Dawson paid $17,602 to Golden Triangle Remodeling for the addition of a computer room over their garage. The room was furnished in 1988 with, inter alia, a desk, a computer cabinet, and custom-built bookcases. During July and August of 1988, Don Lightfoot Home Builder, Inc., made improvements to the residence of petitioner and Ms. Dawson that consisted of remodeling its living room and the bedrooms of their two daughters. The remodeling included installation of hardwood floors and new draperies in all three rooms, removal of part of a wall, and the addition of a skylight to one bedroom and of a bay window to the other. On November 3, 1988, Don Lightfoot Home Builder, Inc., was paid $3,227 for the

improvements by a check drawn on the joint checking account with Texaco P.A.W. Petitioner also signed a check payable to Beaumont Cobbs Carpet, Inc., in the amount of $1,065 to pay expenses for remodeling one of his daughter's bedrooms. Petitioner was aware of the remodeling done at his home.

During 1988, Ms. Dawson purchased beds for their daughters at a cost of $5,000, a red cherry dining room set at a cost of between $5,000 and $6,000, a 25-inch color television and set of oak entertainment cabinets, a crystal chandelier, a living room set, a number of sewing machines, two portable televisions with built-in video cassette recorders, and a camcorder. Petitioner was aware of the items Ms. Dawson purchased for their home during 1988.

Also during 1988, a new Mercury Sable automobile was purchased that was financed with a loan to petitioner. Petitioner also purchased a 1987 Nissan pickup truck for $6,500 and paid for it with two checks he wrote on the joint checking account with Texaco P.A.W. Petitioner and Ms. Dawson also lent $4,400 to Ms. Dawson's sister and her husband for the purchase of a truck.

Also during 1988, petitioner purchased a 1967 28-foot woodhulled Chris Craft boat (Chris Craft) for $7,500, paid for by withdrawals from the joint checking account with Texaco P.A.W. The Chris Craft was licensed and registered to petitioner. The interior cabin of the Chris Craft was

decorated by Fowler's Furniture & Design Gallery (Fowler's) in December 1988 at a total cost of $6,187.85. Petitioner and Ms. Dawson met with an employee of Fowler's to discuss the decoration. Petitioner incurred labor and parts expenses for work performed on the Chris Craft by Eastex Marine Maintenance on or about the following dates in the following amounts:

Aug. 1, 1988	$1,586.67
Aug. 10, 1988	557.47
Oct. 21, 1988	537.15
Nov. 9, 1988	144.00
Total	$2,825.29

Additionally, petitioner paid over $1,000 for further work an the Chris Craft. Petitioner docked the Chris Craft at the Beaumont Yacht Club, and the membership in the club was in his name only. Petitioner paid an annual membership fee and monthly docking fees to the Beaumont Yacht Club for the Chris Craft that totaled approximately $1,250 per year.

During 1988, petitioner and Ms. Dawson went on a Caribbean cruise. During such year, Ms. Dawson's parents went on a Caribbean cruise that petitioner and Ms. Dawson gave them as a present for their anniversary. The cost of the trip was $1,316. Also during that year, petitioner, Ms. Dawson and their daughter Audrey went on a vacation to Disneyland in California. The $1,190 cost of the trip was paid with a check drawn on the joint checking account with Mid County Teachers.

On Christmas Eve 1988, petitioner and Ms. Dawson gave Ms. Dawson's sister, her husband, her sister's two children, and petitioner's and Ms. Dawson's daughter Audrey a vacation to Disneyland. The $2,656 cost of the trip was paid with a check drawn on the joint checking account with Mid County Teachers.

During 1988, petitioner and Ms. Dawson were members of the Pompano Club, a private dining club.

On June 6, 1989, petitioner and Ms. Dawson purchased a 1988 Passport Motor Home (motor home) for $47,804 from Henry Courts RV.

Ms. Dawson did not hide from petitioner any of the items she purchased with embezzled funds.

Petitioner's and Ms. Dawson's Income Tax Returns

Petitioner and Ms. Dawson timely filed a joint Federal income tax return for each of their 1987 and 1988 taxable years (hereinafter respectively referred to as the 1987 return and 1988 return). Their 1987 return reported wage income of $90,611, adjusted gross income of $92,522, and that petitioner's compensation from Gulf States Utilities was $41,782. Their 1988 return reported wage income of $85,862, adjusted gross income of $87,092, and that petitioner's compensation from Gulf States Utilities was $41,604. Forms W-2 for the 1988 taxable year show wages paid to Ms. Dawson by PAHHS and BHHS in

the amounts of $27,854 and $29,902.12, respectively. Such Forms W-2 include $15,000 in wages from PAHHS and $15,000 in wages BHHS paid to Ms. Dawson that were omitted from petitioner's and Ms. Dawson's return for that year. Petitioner assisted Ms. Dawson in preparing the 1988 return. The purported signature of petitioner on the 1988 return is not in fact petitioner's signature.

Petitioner filed a separate Federal income tax return for the taxable year 1989 on May 21, 1990.

Certain Events Occurring Subsequent to the Years in Issue

Petitioner and Ms. Dawson separated on May 1, 1990, and were divorced on December 4, 1990.

On or about July 8, 1991, Ms. Dawson pled guilty in the U.S. District Court, Eastern District of Texas (District Court) to one count of embezzlement, in violation of 18 U.S.C. sec. 666, and one count of income tax evasion for the tax year 1988, in violation of section 7201.

Ms. Dawson was sentenced to 28 months' incarceration in Federal prison. At the time of trial, Ms. Dawson was on supervised release from Federal prison. She was ordered by the District Court to pay, and, at the time of trial, she was paying, (1) restitution to Dr. Constant and (2) taxes to the Internal Revenue Service (IRS) for 1988 in accordance with a payment schedule developed with the IRS.

OPINION

Innocent Spouse Issue

The first issue that we must consider is whether petitioner has shown that he is an innocent spouse with respect to the understatement of tax attributable to the funds embezzled by Ms. Dawson in 1988.

Spouses who file joint tax returns generally are jointly and severally liable for Federal income tax due on their combined incomes, as well as for interest on, and additions to, the tax. Sec. 6013(d)(3); Park v. Commissioner, 25 F.3d 1289, 1292 (5th Cir. 1994), affg. T.C. Memo. 1993-252. The general rule is mitigated to some extent by section 6013(e), known as the "innocent spouse" rule. Park v. Commissioner, supra. Congress regards joint and several liability as an important adjunct to the privilege of filing joint tax returns, which generally results in a lower tax on the combined incomes of spouses than would be due were they to file separate returns, and any relaxation of the rule of liability depends upon compliance with the conditions of section 6013(e). Sonnenborn v. Commissioner, 57 T.C. 373, 380-381 (1971). Because of its remedial purpose, however, the innocent spouse rule must not be given an unduly narrow or restrictive reading. Sanders v. United States, 509 F.2d 162, 167 (5th cir. 1975). The question whether a taxpayer has established that he or she is entitled to

relief as an innocent spouse is one of fact. Park v. Commissioner, supra at 1291.

Section 6013(e)(1) provides in pertinent part that if:

> (A) a joint return has been made under this section for a taxable year,
>
> (B) on such return there is a substantial understatement of tax attributable to grossly erroneous items of one spouse,
>
> (C) the other spouse establishes that in signing the return he or she did not know, and had no reason to know, that there was such substantial understatement, and
>
> (D) taking into account all the facts and circumstances, it is inequitable to hold the other spouse liable for the deficiency in tax for such taxable year attributable to such substantial understatement,
>
> then the other spouse shall be relieved of liability for tax (including interest, penalties, and other amounts) for such taxable year to the extent such liability is attributable to such substantial understatement.

A taxpayer must prove that each requirement of section 6013(e) is met, and failure to prove any one of the

requirements prevents a taxpayer from qualifying for relief as an innocent spouse. Park v. Commissioner, supra at 1292; Purcell v. Commissioner, 826 F.2d 470, 473 (6th Cir. 1987), affg. 86 T.C. 228 (1986); Bokum v. Commissioner, 94 T.C. 126, 138 (1990), affd. 992 F.2d 1132 (11th Cir. 1993). In the instant case, the parties stipulated that petitioner filed a joint return with Ms. Dawson for 1988, notwithstanding that the signature on the return purporting to be petitioner's is not in fact his.[5] Respondent also concedes that there was a substantial understatement of tax attributable to grossly erroneous items of Ms. Dawson on the return. Respondent contends, however, that petitioner knew or had reason to know of the substantial understatement and that it is not inequitable to hold petitioner liable for the deficiency attributable to the substantial understatement.

The knowledge test, as stated above, requires a taxpayer to show that, at the time of signing a joint return, he or she did not know and had no reason to know of the substantial understatement of tax on

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[5]The failure of one spouse to sign a return does not prevent such return from being considered a joint return if the nonsigning spouse intended to file a joint return. See Shea v. Commissioner, 780 F.2d 561, 567 (6th Cir. 1986), affg. in part and revg. and remanding in part T.C. Memo. 1984-310; Estate of Campbell v. Commissioner, 56 T.C. 1, 12 (1971).

the return. The relevant knowledge is of the transaction giving rise to the income omitted from the return, rather than of the tax consequences of such transaction. Park v. Commissioner, supra at 1293-1294; Sanders v. United States, supra at 169; Bokum v. Commissioner, supra at 146. Consequently, a spouse who knows or has reason to know of such a transaction does not qualify for relief as an innocent spouse. Park v. Commissioner, supra; Sanders v. United States, supra. A spouse has "reason to know" of an understatement if

> a reasonably prudent taxpayer under the circumstances of the alleged innocent spouse at the time of signing the return could he expected to know that the tax liability stated was erroneous or that further investigation was warranted. [Park v Commissioner, supra at 1293 (citing Sanders v. United States, supra at 166-167 and n.5.)]

In deciding the issue, factors we consider include: (1) The level of education of the spouse seeking relief; (2) the spouse's involvement in the family's business and financial affairs; (3) unusual or lavish expenditures made by the family; and (4) the "culpable" spouse's refusal to be forthright about the couple's income. Park v. Commissioner, 25 F.3d at 1293; Sanders v. United States, 509 F.2d at 167-170. In reaching our decision, we consider the interplay among the factors, and different

factors will predominate in different cases. Bliss v. Commissioner, 59 F.3d 374, 378 (2d Cir. 1995), affg. T.C. Memo. 1993-390.

Turning to the facts of the instant case, we find that, even if, at the relevant time, petitioner did not actually know that Ms. Dawson was embezzling funds from her employers, i.e., the source of the income,[6] he knew or had reason to know of the receipt of the income attributable to the embezzlement. As to the first factor, level of education, petitioner has presented no evidence. We note, however, that, during the years in issue, petitioner was employed by Gulf States

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[6]We cannot conclude with certainty from the record whether or not petitioner had actual knowledge that Ms. Dawson had embezzled funds from her employers when the 1988 return was signed. For instance, at trial, Ms. Dawson testified that, at the time the couple purchased a motor home in 1989, petitioner told her to get more money from the "agency", i.e., her employers, so that they could make a larger downpayment. The motor home was purchased on June 6, 1989, after the filing of the 1988 return in April 1989. Accordingly, such testimony, even if we were to believe it, would not necessarily establish that petitioner was aware in April 1989 that Ms. Dawson was embezzling funds from her employers. Although Ms. Dawson testified that petitioner had made similar statements at other times, she could not recall specific instances.

Utilities as a power plant operator and control operations foreman, employment from which he earned over $40,000 in 1988, and that he had been so employed since 1982. Beginning in mid-1987 and continuing through the years in issue, petitioner also operated a computer consulting business that included the delivery and installation of computer equipment and the setting up of computerized bookkeeping and payroll systems. Certainly he had some experience in business and financial matters.

As to the second factor, involvement in the family's finances, petitioner contends that Ms. Dawson or her mother handled his family's financial affairs and that he was uninvolved in such matters prior to March 1989, when he admits he assumed responsibility for writing checks to pay his family's bills. Perfect knowledge of one's family's financial affairs, however, is not required to satisfy the reason to know standard. Shea v. Commissioner, 780 F.2d 561, 567 (6th Cir. 1986), affg. in part and revg. and remanding in part T.C. Memo. 1984-310; Sanders v. commissioner, supra at 168. We conclude that petitioner had sufficient involvement in his family's affairs to put a reasonable person in his position on notice that the income reported in the 1988 return was erroneous or that further inquiry was warranted. During 1988, Ms. Dawson caused PAHHS and BHHS to issue to her between 13 and 22 payroll checks per month, with the amounts of the checks ranging from $50 to $1,500. All of the funds embezzled by Ms. Dawson during 1988

were deposited in joint bank accounts over which petitioner had signature authority and on which he wrote checks. The statements for the accounts were mailed to the residence of petitioner and Ms. Dawson, and he opened and looked at least some of the statements. Petitioner knew where the statements were kept at their residence, and he could have reviewed them whenever he desired. Perusal of the bank statements would have alerted petitioner to the actual level of the couple's income. Furthermore, the number of deposits of payroll checks made by Ms. Dawson in the accounts and the dollar amount of the deposits reflected in the statements would have shown petitioner that the amount of income Ms. Dawson was receiving from her employers was larger than the amount he claimed to have believed that it was during 1988. A taxpayer claiming innocent spouse relief cannot simply turn a blind eye to facts within his or her reach that would have put a reasonably prudent taxpayer on notice that further inquiry needed to be made. Sanders v. United States, supra at 169; Bokum v. Commissioner, 94 T.C. at 148; McCoy v. Commissioner, 57 T.C. 732, 734 (1972).

Moreover, in March 1989, petitioner opened a joint checking account at First National Bank of Mid County, into which he deposited certain of Ms. Dawson's payroll checks, checks that petitioner concedes represented some of the funds embezzled from PAHHS and BHHS. Petitioner reviewed and reconciled the statements for the account. As stated above, petitioner

admitted that he assumed responsibility for writing checks to pay his family's bills at that time, prior to the time the 1988 return was filed in April 1989. Petitioner should have become aware no later than March or April 1989 of the true level of his family's income and expenditures. Moreover, petitioner assisted Ms. Dawson in preparing their 1988 joint income tax return.

In addition to his involvement in his family's financial affairs, we consider it significant that petitioner was involved in the business of Ms. Dawson's employers, PAHHS and BHHS. During 1987, petitioner delivered, installed, and programmed computerized bookkeeping and payroll systems for PAHHS and BHHS in the offices of BHHS. Petitioner taught the employees of PAHHS and BHHS to use the systems. During 1988, Ms. Dawson used the systems to embezzle funds from her employers. Petitioner also installed computers in the offices of other corporations operated by Dr. Constant. Petitioner also worked as a "handyman" for BHHS, setting up offices and moving furniture and boxes.

The third factor we consider is the presence of unusual or lavish expenditures by petitioner's family. A taxpayer claiming relief as an innocent spouse cannot close his or her eyes to unusual or lavish expenditures that might have alerted him or her to unreported income. Terzian v. Commissioner, 72 T.C. 1164, 1170 (1979); Mysse v. Commissioner, 57 T.C. 680, 699 (1972). The presence of

unusual or lavish expenditures may put a taxpayer on notice that it is probable that income is being omitted from a joint return. Estate of Jackson v. Commissioner, 72 T.C. 356, 361 (1979).

The overall amount of spending by petitioner and Ms. Dawson during 1988 should have put petitioner on notice that it was probable that income was omitted from their 1988 return. Petitioner and Ms. Dawson wrote checks on the joint checking account with Mid County during 1988 that totaled $146,752.26. During 1988, petitioner and Ms. Dawson wrote checks on the joint checking account with Texaco P.A.W. in the amount of $145,458.62. The total amount of the checks written on both the accounts thus exceeded $290,000. Such a level of expenditure was made possible by the deposit in the accounts of the $153,726 that Ms. Dawson embezzled from her employers during 1988. Although the record indicates that petitioner may have written only a relatively small percentage of the checks drawn on the accounts, and petitioner claimed to have been uninvolved in his family's finances prior to March 1989, we do not think it reasonable to conclude that he failed to notice that during 1988, he and Ms. Dawson spent an amount that was two or three times (1) the amount that he claimed to have believed to have been their income for each of 1987 and 1988 (viz., between $90,000 to

$120,000) and (2) the amount of adjusted gross income reported on each of their 1987 and 1988[7] returns.

The specific expenditures disclosed by the record that were made during 1988 also should have alerted petitioner to the probable omission of income from the 1988 return. While the record shows that in 1987 a Lincoln Continental automobile and a Ford Big Bronco automobile were purchased, and a three-car garage costing $9,700 was added to petitioner's and Ms. Dawson's home, we find that expenditures made by petitioner's family in 1988 were lavish or unusual.

Significant sums were spent to remodel and furnish petitioner's home during 1988. Petitioner and Ms. Dawson paid $17,602 for the addition of a computer room over their garage. They also paid $3,227 for the remodeling of their living room and the bedrooms of their two daughters. Petitioner signed a further $1,065 check to pay expenses in connection with the remodeling.[8] Petitioner

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[7]Petitioner has conceded that the 1988 return omitted the following amounts received by Ms. Dawson: (1) $30,000 of wage income from PAHHS and BHHS; (2) gross receipts of $740, and (3) a pension distribution of $1,055.

[8]Petitioner claims that the remodeling discussed above was financed by a loan. Although a loan of approximately $15,000 was funded in 1987, the total cost of the

was aware of the remodeling. Petitioner was also aware in 1988 that Ms. Dawson purchased beds for their daughters at a cost of $5,000, a red cherry dining room set at a cost of between $5,000 and $6,000, a 25-inch color television and set of oak entertainment cabinets, a crystal chandelier, a living room set, a number of sewing machines, two portable televisions with built-in video cassette recorders, and a camcorder.

Expenditures for automobiles and a boat were also made during 1988. A Mercury Sable automobile was purchased, and petitioner purchased a 1987 Nissan pickup truck for $6,500, paying for it with two checks he wrote on the joint checking account with Texaco P.A.W. Also, petitioner and Ms. Dawson lent her sister and her husband $4,400 for the purchase of a truck. Petitioner also purchased a 28-foot Chris Craft boat for $7,500, paying for it with withdrawals from the joint checking account with Texaco P.A.W. Petitioner and Ms. Dawson paid $6,187.85 to decorate the boat, meeting with the decorator to discuss the decoration. Petitioner also incurred maintenance

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remodeling of petitioner's home in 1987 and 1988 after the funding of the loan exceeded the amount of the loan. Moreover, it seems reasonable to us that Ms. Dawson's embezzlement provided a source of funds from which payments on the loan could be made, aiding petitioner and Ms. Dawson in carrying the loan.

expenses of over $2,825.29 with respect to the boat in 1988. Petitioner paid yacht club membership and dockage fees of $1,250 with respect to the boat.

Significant travel financed by petitioner and Ms. Dawson also occurred during 1988. Petitioner and Ms. Dawson went on a Caribbean cruise. They gave Ms. Dawson's parents such a cruise costing $1,316 as an anniversary present. Petitioner, Ms. Dawson, and their daughter Audrey went on a vacation costing $1,190 to Disneyland in California. Petitioner and Ms. Dawson gave her sister, her husband, their two daughters, and petitioner's and Ms. Dawson's daughter Audrey a vacation costing $2,656 to Disneyland.

The fourth factor we consider is whether Ms. Dawson was forthright about the omitted income. Petitioner has not established that Ms. Dawson was evasive concerning her true level of income. We have found that Ms. Dawson did not attempt to hide the income from her embezzlement or her expenditures from petitioner. Indeed, all of the embezzled funds were deposited in and disbursed from joint checking accounts to which petitioner had access and with respect to which statements were available to him.

Under the circumstances of the instant case, a reasonably prudent person would have seriously questioned the gross income reported in the joint return petitioner and Ms. Dawson filed for 1988, and petitioner, therefore, had a duty of

inquiry with respect to the correctness of the reported income, a duty that he failed to discharge. Park v. Commissioner, 25 F.3d at 1293; Sanders v. United States, 509 F.2d at 167. We accordingly find, based on the entire record, that petitioner knew or had reason to know of the substantial understatement of tax on the 1988 return resulting from the omission of the income embezzled by Ms. Dawson during such year.

The next matter we consider is whether it would be inequitable to hold petitioner liable for the deficiency attributable to the omission of the funds embezzled by Ms. Dawson from the 1988 return. Sec. 6013(e)(1)(D). In deciding the issue, we take into account all of the facts and circumstances. Id.; sec. 1.6013-5(b), Income Tax Regs. A factor to be considered is whether the person seeking relief significantly benefited, directly or indirectly, from the omitted income.[9]

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[9]Although sec. 6013(e)(1)(D), since its amendment in 1984, no longer expressly requires that a taxpayer seeking relief as an innocent spouse show that he or she did not significantly benefit from items of income omitted from a joint return, the question of significant benefit is nonetheless a factor properly to be considered in deciding whether it is inequitable to hold a spouse liable for the understatement attributable to the omission. Estate of Krock v. Commissioner, 93 T.C. 672, 678 (1989); Purcell v. Commissioner, 86 T.C. 228, 241 (1986), affd. 826 F.2d 470 (6th Cir. 1987).

Buchine v. Commissioner, 20 F.3d 173, 181 (5th Cir. 1994), affg. T.C. Memo. 1992-36; sec. 1.6013-5(b), Income Tax Regs. Normal support, which is to be measured by a couple's circumstances, is not considered a significant benefit. Sanders v. United States, supra at 168; Terzian v. Commissioner, 72 T.C. at 1172; Mysse v. Commissioner, 57 T.C. at 699. A significant benefit exists if expenditures have been made which are unusual for the taxpayer's accustomed lifestyle. Terzian v. Commissioner, supra. Other factors include: (1) Whether the spouse seeking relief has been deserted by the other spouse or is divorced or separated from that spouse, sec. 1.6013-5(b), Income Tax Regs.; and (2) probable future hardships that would be visited upon the purportedly innocent spouse were he or she not relieved from liability, Sanders v. United States, supra at 171 n.16.

We conclude, based on the record in the instant case, that petitioner received a significant benefit from the funds that Ms. Dawson embezzled in 1988. The embezzled funds allowed more funds to be available for petitioner's household than were provided by the wage income that was earned by petitioner and Ms. Dawson and reported on their 1988 return. Petitioner has not shown that Ms. Dawson used the funds exclusively for her own benefit, and it appears to us that the funds were largely expended for the benefit of petitioner's family or Ms. Dawson's relatives. The record shows that petitioner enjoyed significant benefits, such as expensive remodeling of and

furnishings for his home, a boat which was purchased and redecorated at significant cost, and vacations to the Caribbean and Disneyland. Petitioner has not established that such expenditures were characteristic of his accustomed lifestyle, and we conclude that the benefits they afforded him were unusual for his lifestyle. With respect to the other factors to be considered, we note that, while petitioner was not deserted by Ms. Dawson, they separated and were divorced in 1990. Such circumstance, however, does not outweigh the significant benefit that petitioner received from Ms. Dawson's embezzlement. Petitioner also has not established that any hardships would be visited upon him were he not to be relieved from liability for the deficiency attributable to the omission of the embezzled funds from the 1988 return.

We find, therefore, that it would not be inequitable to hold petitioner liable for the understatement attributable to the funds embezzled by Ms. Dawson in 1988.

Based upon the foregoing, we hold that petitioner is jointly and severally liable for the deficiencies in, and additions to, tax attributable to the funds Ms. Dawson embezzled from her employers during that year.

Community Income Issue

The next issue we shall consider is whether any of the funds embezzled by Ms. Dawson during 1989 are taxable to

petitioner.[10] Petitioner is taxable on the funds to the extent of his ownership interest under Texas law. United States v. Mitchell, 403 U.S. 190, 194-197 (1971), and cases cited therein. Texas law provides for a community system of property rights of spouses. Tex. Const. art. 16, sec. 15; Tex. Fam. Code Ann. sec. 5.01 (West 1993). Under that system, each spouse has a vested interest in, and is the owner of, one-half of all such property. Johnson v. Commissioner, 72 T.C. 340, 343 (1979). Consequently, a spouse is liable for the Federal income tax on the portion of any income that is community property. Id. A spouse, however, has no ownership interest in, and is not taxable on, income that is the separate property of the other spouse. Id. Our inquiry accordingly focuses on whether the $95,072 embezzled by Ms. Dawson during 1989 was community property or her separate property.

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[10]Because petitioner filed a separate tax return from Ms. Dawson for 1989, petitioner concedes that he is not eligible for relief as an innocent spouse under sec. 6013(e). Petitioner, however, does not contend, and we do not consider whether, he qualifies as an innocent spouse pursuant to sec. 66(c), under which a taxpayer who does not file a joint return may be relieved of liability for tax on items of community income attributable to the taxpayer's spouse. See Roberts v. Commissioner., 860 F.2d 1235, 1238-1239 (5th Cir. 1988), affg. T.C. Memo. 1987-391.

The pertinent Texas statute defines community property as "the property, other than separate property, acquired by either spouse during marriage." Tex. Fam. Code Ann. sec. 5.01(b) (West 1993). We have previously held that the well-established rule in Texas is that the term "acquired" as it is used in the statute refers to the origin or inception of title. Johnson v. Commissioner, supra at 344. In Johnson v. Commissioner, supra at 344, we reasoned as follows:

> Consequently, a spouse who acquires property during marriage must acquire some legal title to the property before such property will be characterized as community property. Hence, if a spouse acquires possession of property without title, the property remains the separate property of such spouse.

* * * * * * *

> Under Texas law, where property is acquired illegally, whether title to such property passes to the illegal taker depends on whether the owner intended to pass both possession and title to the illegal taker. [Citations omitted.]

We must accordingly consider whether petitioner has carried his burden of proving that PAHHS and BHHS did not intend to pass to Ms. Dawson both possession of

and title to the funds she embezzled in 1989. Ms. Dawson was authorized to issue the payroll checks in her name that represented the embezzled funds. she was responsible for and had signature authority over all of the payroll checking accounts maintained by PAHHS and BHHS and issued all of the payroll checks for those entities. Ms. Dawson, therefore, possessed the authority to act on behalf of those entities to pass both possession of and title to the funds in those payroll accounts to others. Based upon our consideration of the entire record in the instant case, we conclude that petitioner has not carried his burden of proving that, in issuing the checks, PAHHS and BHHS did not intend to pass to Ms. Dawson both possession of and title to the funds embezzled by her during 1989. Rule 142(a).

We, therefore, hold that the $95,072 embezzled by Ms. Dawson during 1989 is community income, one-half of which is taxable to petitioner.

To reflect concessions and the foregoing,

Decisions will be entered under Rule 155.

APPENDIX E

MARY HELEN JOHNSON, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 10423-76. Filed May 14, 1979.

During 1973, petitioner's husband along with two other individuals was involved in a scheme to defraud the Federal Government by filing false income tax refund claims with the Internal Revenue Service. *Held*, under Texas law a portion of the income petitioner's husband derived from this illegal scheme is community property and, therefore, petitioner is taxable on one-half of such portion. *Held, further,* petitioner is entitled to deduct under sec. 212(1), I.R.C. 1954, a portion of the legal fees paid in connection with her husband's unsuccessful defense of the criminal charges brought against him as a result of his participation in the fraudulent refund scheme.

Towner Leeper, for the petitioner.
James N. Mullen, for the respondent.

FAY, *Judge*: Respondent determined a deficiency in petitioner's Federal income tax for the taxable year 1973 in the amount of $11,643. Concessions having

been made, the only remaining issues for decision are:

(1) Whether illegal income obtained by petitioner's husband in a false Federal income tax refund scheme constitutes community property and, hence, income to the petitioner.

(2) Whether petitioner is entitled to deduct under section 162[1] or section 212 a portion of the legal fees paid to defend her husband against criminal charges brought as a result of his participation in the false refund scheme.

FINDINGS OF FACT

Some of the facts have been stipulated and are found accordingly.

At the time of filing her petition herein, Mary Helen Johnson resided in El Paso, Tex. Throughout 1973, petitioner was married to Jerry E. Johnson (Johnson). For the taxable year 1973, petitioner filed a separate Federal income tax return.

During 1973, petitioner's husband was involved with two other individuals in a scheme to defraud the Federal Government by filing false income tax refund claims with the Internal Revenue Service.

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[1]All statutory references are to the Internal Revenue Code of 1954, as amended, and in force during the years in issue.

Petitioner did not participate in or know of this scheme. The two other individuals involved in the scheme were an Internal Revenue Service employee, Cora Fraley Baggett (Baggett), and her brother John T. Fraley (Fraley).

The scheme began when Fraley learned that his sister, Baggett, who worked at the Internal Revenue Center in Austin, Tex., had generated false refund checks for several other members of their family. Thereafter, Fraley persuaded her to do the same for him and Johnson. The refund checks were generated as follows: Baggett researched the microfilms at the Service Center and located taxpayers with names similar to Fraley and Johnson. She then made a master file change, altering the addresses of the real taxpayers to addresses supplied to her by Fraley. She would then prepare false claims on a refund claim form, Form 843, or file a false amended return, Form 1040X. These false claims usually reflected a casualty loss. Baggett would approve the false claims, and refund checks in the amounts claimed would be made out by the Government in the name of the real taxpayers and mailed to the addresses provided by Fraley.

To enable them to negotiate the checks, Fraley and Johnson opened numerous bank accounts in Texas, New Mexico, and Indiana. Most of these accounts were joint accounts in which fictitious women's names were used as their wives. When necessary, the women's names would be signed by Fraley or Johnson. When a

refund check was received in the mail, it would be deposited by Fraley or Johnson in one of these bank accounts. After a short period of time, the balance in an account would be withdrawn and Fraley and Johnson would divide the proceeds.

In addition to the false claims Baggett prepared using other taxpayers' names, she also prepared four false refund claims using petitioner's and her husband's actual names. These four claims covered the years 1966, 1968, 1969, and 1970. Four refund checks dated August 31, 1973, and made payable to petitioner and her husband were mailed to them. These four checks totaled $6,180.51. Petitioner's husband signed both his and petitioner's name to these checks and cashed them at a bank in El Paso, Tex.

Johnson's share of the total proceeds from this scheme during 1973 was $59,595.77.

Sometime during 1973, the fraudulent scheme was discovered and a criminal information was subsequently filed against Baggett charging her with conspiracy to commit an offense, 18 U.S.C. sec. 371, and making a false claim upon an agency of the United States, 18 U.S.C. sec. 287. She pleaded guilty to both counts. In addition, Fraley and Johnson were charged with conspiracy to defraud the Government, 18 U.S.C. sec. 286, and they too pleaded guilty.

In connection with his defense to the charge of conspiracy, petitioner's husband

incurred $7,001 in legal fees. To pay this amount, petitioner and her husband on November 22, 1973, transferred a 1974 Cadillac convertible to the attorney who represented him.[2]

Prior to the time petitioner filed her Federal income tax return for 1973, she learned of her husband's involvement in the fraudulent refund scheme. Thus, on her separate return for 1973, petitioner stated that her husband had $9,419 in illegal income for the year and she included one-half, $4,709, as her community income. In addition, petitioner claimed one-half of the legal fees as a deduction.

In the statutory notice, respondent determined that petitioner's husband's illegal income for 1973 amounted to $59,595.77 and that petitioner was taxable on one-half of this amount or $29,797.89 less the $4,709 already included. Respondent also disallowed the deduction for legal expenses.

OPINION

The first issue we must decide is whether the illegal income obtained by petitioner's husband in a false income tax refund scheme constitutes community property and, hence, income to the petitioner.

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[2]The record also shows that a 1972 Cadillac owned by petitioner was seized and sold by the Internal Revenue Service in payment of certain taxes.

Texas is a community property state. Tex. Const. art. 16, sec. 15; Tex. Fam. Code Ann. sec. 5.01 et seq. (Vernon 1974). Under Texas law, community property is defined as all property acquired by either spouse during marriage except for property acquired by gift, devise, descent, or in recovery for personal injuries sustained by a spouse during marriage. Tex. Fam. Code Ann. sec. 5.01 (Vernon 1974). These latter categories constitute a spouse's separate property. Tex. Fam. Code Ann. sec. 5.01 (Vernon 1974).

With respect to community property, each spouse has a vested interest in and is owner of one-half of all such property. *Hopkins v. Bacon*, 282 U.S. 122, 126 (1930); *Lange v. Phinney*, 507 F.2d 1000, 1005 (5th Cir, 1975); *Dillard v. Dillard*, 341 S.W.2d 668, 670 (Tex. Civ. App. 1961). As a result of her ownership of one-half of all community property, a wife is liable for the Federal income taxes on such share. *United States v. Mitchell*, 403 U.S. 190, 196 (1971); *Hopkins v. Bacon*, *supra* at 127; *Poe v. Seaborn*, 282 U.S. 101, 118 (1930); *Lange v. Phinney*, *supra*. Therefore, in the present case, if the illegal income earned by her husband is community property, petitioner is taxable on one-half of such amount even though she had no part in its acquisitions.[3] Conversely, if the illegal

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[3]It has been well settled for a number of years that income earned illegally is taxable. James v. United States, 366 U.S.

income is her husband's separate property, petitioner is not liable for any tax on such amounts because she has no ownership interest in his separate property. Tex. Fam, Code Ann. sec. 5.21 (Vernon 1974). See *Blake v. Commissioner*, 20 T.C. 721, 731 (1953); *O'Connor v. Commissioner*, 40 B.T.A. 489, 490 (1939), affd. 110 F.2d 652 (5th Cir. 1940).

As provided in sec. 5.01 of the Texas Family Code, property must be "acquired" during marriage to constitute community property. It is a well-established rule in Texas that the word "acquired" as it is used in this statute refers to the origin or inception of title. *Wrightsman v. Commissioner*, 111 F.2d 227, 228 (5th Cir. 1940); *Lee v. Lee*, 247 S.W. 828, 832 (1923). See also Speer, Texas Family Law, sec. 15:7 (5th ed. 1976). Consequently, a spouse who acquires property during marriage must acquire some legal title to the property before such property will be characterized as community property. *Wrightsman v. Commissioner, supra*. Hence, if a spouse acquires possession of

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213, 219 (1961); *Rutkin v. United States*, 343 U.S. 130, 137 (1952); *Nerem v. Commissioner*, 41 T.C. 338, 341 (1963). See also *Galliher v. Commissioner*, 62 T.C. 760, 764 (1974), affd. 512 F.2d 1404 (5th Cir. 1975), cert. denied 423 U.S. 988 (1975); *Hill v. Commissioner*, 32 T.C. 254, 255 (1959).

property without title, the property remains the separate property of such spouse. *Wrightsman v. Commissioner, supra.*

With these principles in mind, the resolution of the first issue in this case depends on whether petitioner's husband acquired title to his share of the proceeds derived from the false refund scheme. Since the nature of an individual's legal interest in property is a matter of State law, we must look to Texas law to determine whether petitioner's husband acquired title to these proceeds. *United States v. Mitchell, supra* at 197 (1971); *Aquilino v. United States,* 363 U.S. 509, 513 (1960); *Estate of Williams v. Commissioner,* 62 T.C. 400,407 (1974).

Under Texas law, where property is acquired illegally, whether title to such property passes to the illegal taker depends on whether the owner intended to pass both possession and title to the illegal taker. *De Blanc v. State,* 118 Tex. Crim. 628,37 S.W.2d 1024, 1027 (1931). See also *Roe v. State,* 140 Tex. Crim. 299, 144 S.W.2d 1104, 1107 (1940); *Lovine v. State,* 136 Tex. Crim. 32, 122 S.W.2d 1069, 1070 (1939); *Baldwin v. State,* 132 Tex. Crim. 427, 104 S.W,2d 872, 873 (1937); *Hoovel v. State,* 125 Tex. Crim, 545, 69 S.W.2d 104, 109 (1934); *Shelton v. Thomas,* 11 S.W.2d 254, 257 (Tex. Civ. App. 1928).

In *De Blanc v. State*, *supra*, the appellant was employed as a bank messenger by the Texas Bank & Trust Co. (Texas) in Austin, Tex. His duty was to carry money transfers between Texas and other local banks. On one occasion, while acting without authority, the appellant presented a transfer request for $5,000 to the Austin National Bank (Austin). Upon obtaining the money, he converted it to his own use. The appellant was subsequently convicted of theft. On appeal, the appellant argued that he had obtained title as well as possession of the money and, therefore, he was not guilty of theft.[4] The court held that, based on the evidence presented, it was clear Austin did not intend to vest title to the funds in the appellant since Austin made the transfer to the appellant only because of his false representation that he had the authority to receive the money on behalf of Texas, and his implied assurance that he would turn the money

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[4]At the time of *De Blanc v. State*, 118 Tex. Crim. 628, 37 S.W.2d 1024 (1931), passage of title was the distinction between the crimes of theft and swindling in Texas. If title did not pass, the crime was theft, but if title did pass, the crime was swindling. See *Segal v. State*, 98 Tex. Crim. 485, ___, 265 S.W. 911, 912 (1924). This distinction was subsequently abandoned by the Texas courts. See *Bomar v. Insurors Indemnity & Ins. Co.*, 150 Tex. 484, 242 S.W.2d 160, 162 (1951).

over to Texas. Relying on its conclusion that title did not pass to the appellant, the court affirmed his conviction for theft.

In the present case, respondent contends that the Government was induced by the fraudulent representations made by Baggett, Fraley, and Johnson to pass both possession and title to the refund checks to these three individuals.[5] Petitioner, on the other hand, argues that her husband merely misappropriated Government funds

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[5]Respondent also contends that under the former Texas Penal Code, which was in effect during 1973, Baggett, Fraley, and Johnson would have been guilty of the crime of swindling and, therefore, title to the refund checks passed to them. This contention is apparently based on respondent's belief that when the crime in swindling, title is deemed to pass. However, under Texas law title does not pass merely because the crime committed is swindling; when title passes it is because a court has concluded on the evidence presented that title passes. See *Bomar v. Insurors Indemnity & Ins. Co., supra* at 163; *Imperial Ins. Co. v. Ellington,* 498 S.W.2d 368, 372 (Tex. Civ. App. 1973); *De Blanc v. State, supra* at 1028. We, therefore, must consider the evidence presented in the instant case to determine whether title passed. We cannot simply conclude that title passed because Baggett, Fraley, and Johnson may have been guilty of swindling under Texas law.

and in so doing obtained possession only of the refund checks.

Following the approach adopted by the Texas courts, whether petitioner's husband obtained title to the refund checks depends on whether the Government intended to pass both possession and title to these checks to him. Having considered all the facts in the present case, we conclude that with respect to the four refund checks totaling $6,180.51 made payable to petitioner and her husband, the Government intended to pass both possession and title to these checks to them. However, with respect to the other refund checks we conclude that the Government did not intend to pass possession and title to these checks to petitioner's husband.

A key facter in our determination was the manner in which Baggett, Fraley, and Johnson obtained the refund checks from the Government. To induce the Government to issue the checks, Baggett prepared false refund claims and amended returns that usually showed a casualty loss. In preparing these claims, she used the names of taxpayers obtained from the master file at the Internal Revenue Service where she worked and addresses supplied to her by her brother. Baggett then submitted the refund claims and approved them for payment. This scheme is similar to the scheme employed by the bank messenger in *De Blanc v. State*, supra, in that without the false representations Baggett, Fraley, and Johnson would not have been able to obtain the checks from the Government.

Moreover, in *De Blanc*, the court held that title did not pass to the bank messenger because Austin transferred the money to him only because of his false representation that he had the authority to receive the money on behalf of Texas and his implied assurance that he would turn the money over to Texas. Similarly, in the present case, because of the false representations made by Baggett, Fraley, and Johnson, the Government believed it was issuing the checks to taxpayers with bona fide refund claims. Hence, we conclude that when the Government mailed the refund checks, it intended to pass possession and title to these checks only to the taxpayers whose names were on the checks and to no one else.

We, therefore, hold that with respect to the checks made payable to other taxpayers, petitioner's husband did not acquire title to these checks. However, with respect to the four checks made payable to petitioner and her husband, we hold that they did acquire title to these checks.

Since the petitioner and her husband acquired title to the four refund checks totaling $6,180.51, this amount constitutes community property. As a result, petitioner is taxable on one-half of this amount.

The second issue for our decision is whether petitioner is entitled to deduct under section 162 or section 212 a portion of the legal fees paid to defend her

husband against criminal charges brought as a result of his participation in the refund scheme.

In connection with his defense against the charge of conspiracy to defraud the Government, petitioner's husband incurred $7,001 in legal fees. This amount was paid by petitioner and her husband when they transferred a 1974 Cadillac convertible to his attorney in 1973.

Respondent contends that petitioner is not entitled to a deduction for these legal fees under either section 162 or section 212. Petitioner, citing *Commissioner v. Tellier*, 383 U.S. 687 (1966), argues that legal expenses incurred in connection with the unsuccessful defense of a criminal prosecution are deductible.

Generally speaking, since Texas is a community property State, for Federal income tax purposes each spouse is entitled to a deduction for one-half of all the expenses properly chargeable against community income. *Stewart. v. Commissioner*, 35 B.T.A. 406, 411 (1937), affd. 95 F.2d 821 (5th Cir. 1938). Moreover, while we recognize that since the Supreme Court's decision in *Commissioner v. Tellier, supra*, there is no longer any public policy objection to the deduction of legal expenses incurred in the unsuccessful defense of criminal charges, such expenses to be deductible must still meet the requirements of either section 162 or section 212.

Section 162(a) allows a deduction for ordinary and necessary expenses paid or incurred during the taxable year in "carrying on any trade or business." Closely related to that provision, section 212(1) allows a deduction for ordinary and necessary expenses paid or incurred during the taxable year "for the production or collection of income." While both sections refer to the same kinds of deductible expenses, this latter section makes those deductions allowable with respect to income-producing or profit-seeking activities which do not constitute a trade or business. *United States v. Gilmore,* 372 U.S. 39, 44-45 (1963);

Trust of Bingham v. Commissioner, 325 U.S. 365, 374 (1945); *Rafter v. Commissioner,* 60 T.C. 1, 8 (1973), affd. 489 F.2d 752 (2d Cir. 1974), cert. denied 19 U.S. 826 (1974). The purpose of the two sections was "to place all income-producing activities on an equal footing" in terms of allowable deductions. *United States v. Gilmore, supra* at 49; *Trust of Bingham v. Commissioner, supra; Rafter v. Commissioner, supra.* However, both sections must be applied in light of section 262 which disallows deductions for expenses that are personal in nature.

In *United States v. Gilmore, supra,* the Supreme Court stated that the characterization of litigation expenses incurred in resisting a claim as "business" or "personal" depends on whether or not the claim arises in

connection with the taxpayer's income-producing activities. *United States v. Gilmore, supra* at 49. Thus, the controlling criteria are the origin and character of the controversy which led to the expense rather than the potential consequences to the taxpayer of failing to defend the litigation. *United States v. Gilmore, supra* at 49.

Whether petitioner may deduct a portion of the legal expenses under section 212(1) depends on whether such expenses were incurred by her husband in connection with the collection or production of income. More specifically, in light of *United States v. Gilmore, supra,* the question is whether the criminal prosecution brought against petitioner's husband which led to the expenses arose in connection with his profit-seeking activities.

It is evident that the criminal prosecution brought against petitioner's husband stemmed directly from his attempt to obtain income illegally through the refund scheme. Thus, applying the Supreme Court's test in *United States V. Gilmore, supra,* we conclude that petitioner's husband's legal expenses arose in connection with the production of income within the meaning of section 212(1).

In *Commissioner v. Tellier, supra,* the Supreme Court held that where the requirements of section, 162(a) were satisfied, legal expenses incurred in

connection with the unsuccessful defense of criminal charges were deductible. Since the purpose of section 162 and section 212 is to put all income-producing activity on equal footing in terms of allowable deductions, we believe the holding in *Commissioner v. Tellier, supra*, applies to legal expenses incurred in the unsuccessful defense of criminal charges stemming from the production of income under section 212(1).

At trial, petitioner conceded that to the extent the income her husband received from the illegal scheme was his separate property she was not entitled to a deduction for the legal expenses attributable to such separate property. Since we have determined that only $6,181.51 of the $59,595.77 that petitioner's husband derived from the refund scheme is community income, we conclude that only a proportionate share of the legal expenses are deductible by petitioner as expenses incurred in connection with the production of this community income. See *Stewart v. Commissioner, supra; Wrightsman v. Commissioner*, 40 B.T.A. 502, 507 (1939), affd. 111 F.2d 227 (5th Cir. 1940). We, therefore, hold that petitioner is entitled to deduct under section 212(1) $363.03 of the $7,001 in legal fees paid to defend her husband against the criminal

charges brought as a result of his participation in the fraudulent refund schemes.[6]

To reflect the foregoing,

Decision will be entered under Rule 155.

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[6]In calculating the amount deductible we used the following formula:

$$X = \frac{\$\ 6,180.51}{\$59,595.77} \times \$7,001$$

The result of this calculation, $726.05, was then divided in half to obtain petitioner's deductible share of the expenses attributable to the community income.

APPENDIX F

DE BLANC v. STATE.
No. 13991.
Court of Criminal Appeals of Texas.
April 8, 1931

1. **False pretenses = 20.**

Where facts are such as would warrant prosecution on either swindling or theft, indictment should be for theft (Pen. Code 1925, arts. 1413, 1545, 1549).

2. **False pretenses = 20.**

Prosecution should be for swindling only where facts would not sustain conviction for theft, or conviction under some other provision of Penal Code penalizing fraudulent acquisition of property (Pen. Code 1925, arts. 1545, 1549).

3. **Larceny = 13.**

That bank parting with money to messenger of another bank did not expect to have returned identical bills delivered would not be fatal to conviction for theft.

4. **Larceny = 32(6).**

Indictment charging corporation's money was stolen *held* sufficient without naming agent.

5. **Larceny = 73.**

In prosecution for theft by bank messenger obtaining money from bank under pretense money was for his bank, evidence did not warrant charge title to money passed to accused.

6. **Criminal law = 448(16).**

Query whether title to money, passed to bank when delivered to accused bank messenger *held* properly excluded as calling for legal conclusion.

7. **Larceny = 68(1).**

In prosecution of bank messenger for theft of money obtained from bank, ownership of property was a question of law.

Appeal from District Court, Travis County; George Calhoun, Judge.

H. De Blanc was convicted of theft and he appeals.

Affirmed.

Shelton & Shelton, of Austin, for appellant.

Lloyd W, Davidson, State's Atty., of Austin, for the State.

MORROW, P. J.

The offense is theft; penalty assessed at confinement in the penitentiary for a period of five years.

The appellant was a bank messenger. He wore a uniform identifying him as a messenger of the Texas Bank & Trust Company. The Texas Bank & Trust Company bad an account at the Austin National Bank, both of which were situated in Austin, Tex., and had mutual business transactions. It was customary to transfer money from one bank to the other by the bank messenger. The appellant had acted in the capacity mentioned for a long time. On the 31st day of December, 1929, he entered the Austin National Bank and applied to the note teller for $5,000. The money was delivered to him and he signed what was termed a "debit slip," of which the following is a copy:

Debit Austin, Texas, 12-31 1929
Texas Bit & Trust Co.

The Austin	10s	2 000--
National Bank	5s	3 000--
NO-PRO 8		
88-17		5 000--

H. De Blanc.

Touching the custom of the banks with reference to debits in connection with the matter, the following is taken from the testimony: "We did not charge that against the Texas Bank & Trust Company. The slips

go through the clearing house and are handled the same as if somebody else checks on the Texas Bank & Trust Company. We would have gotten our money in clearing house settlement. We get a settlement at 11:00 o'clock every morning, the difference between their checks and ours. They would either give us a check on one of their correspondent banks, or we would give them one."

The appellant was not authorized or directed by the Texas Bank & Trust Company to get the money from the Austin National Bank, and he did not deliver the money to the Texas Bank & Trust Company.

The debit slip mentioned above was never honored. The Austin National Bank delivered the money to the appellant under the circumstances detailed above, to be delivered by him to the Texas Bank & Trust Company agreeable to the custom applicable to debit slips such as above described.

In Segal's Case, 98 Tex. Cr. R. 485, 265 S. W. 911, 35 A. L. R. 1331, it appeared that the accused purchased goods on credit. It was contended upon the trial that Segal, having at the time be bought the goods no intent to pay for them, characterized him *as* guilty of the offense of theft. This theory was rejected by the court upon the ground that the owner of the goods had the intention at the time of parting with both title to and possession of his goods.

In the present instance, the appellant invokes the principle mentioned and maintains that his offense is not theft for the reason that the Austin National Bank intended to part with both possession of and title to the $5,000.

Many of the cases cited and discussed in Segal's Case, supra, are illustrative of the fact that whether it was the intent of the owner to part with the possession only or possession and title is the basis of the distinction between the offense of theft and swindling. They, however, also illustrate the point that such intent is not the sole distinction. For example, the false pretext which results in the delivery of the property may embrace, not only the false representation of a past event, but a condition subsequent. Pertinent cases are the following:

In the case of Anderson v. State, 77 Tex. Cr. R. 31, 177 S. W. 85, the facts were, in substance, as follows: Sims owned two hogs. Anderson proposed to buy them. Sims consented to sell them at $7 a piece, and at that price an agreement was made with Sims to sell and Anderson to buy the hogs. Anderson offered to pay Sims if be would deliver the hogs at the home of Anderson. Sims declined, but referred him to Kellum, and, in consideration of $1 to be paid by Anderson, Kellum removed the hogs to Anderson's home. Anderson represented at the time of the purchase that he had the money at his home. Sims demanded cash and said he needed the money to pay a note and would not sell on credit. When the hogs reached Anderson's

home, Sims demanded his money and Anderson refused to pay it. Upon these facts Anderson was held guilty of theft by false pretext. It is to be noted that Sims parted with the possession of his hogs with the intent to vest in Anderson the title also. However, such intent was based upon Anderson's representation that he had the money at his home which would be delivered to Sims upon reaching Anderson's home. Upon this misrepresentation of fact that he had the money at his home and the assurance that it would be paid upon the delivery of the hogs, Sims permitted Anderson to take possession of the hogs, but upon the facts, including the falsity of Anderson's representation that he had the money to pay for the hogs upon their delivery and would do so, the conviction of Anderson for theft by false pretext was sustained.

In the case of Hedge v. State, 89 Tex. Cr. R. 236, 229 S. W. 862, 864, 14 A. L. R. 899, the facts were as follows: Watkins owed Hedge $636.79, and by mistake delivered to him a check for $1,061, which was $424.21 in excess of the indebtedness of Watkins to Hedge. The conviction of Hedge for the offense of theft was sustained by this court in a comprehensive opinion by Judge Lattimore, in which it was said: "It appellant received the check in question, knowing at the time that it represented a larger amount than was due him, and intended at the time of its reception to appropriate to his own use such amount as might be in excess of what was his, and did so appropriate It, his action would be theft."

The Theft Statute (article 1413, P. C. 1925) reads as follows: "The taking must be wrongful, so that if the property came into the possession of the person accused of theft by lawful means, the subsequent appropriation of it is not theft, but If the taking, though originally lawful, was obtained by any false pretext, or with any intent to deprive the owner of the value thereof, and appropriate the property to the use and benefit of the person taking, and the same is so appropriated, the offense of theft is complete."

Article 1545, P. C. 1925, defining swindling reads thus: "'Swindling' is the acquisition of any personal or movable property, money or instrument of writing conveying or securing a valuable right, by means of some false or deceitful pretense or device, or fraudulent representation, with intent to appropriate the same to the use of the party so acquiring, or of destroying or impairing the right of the party justly entitled to the same."

Article 1549, P. C., is as follows: "Where property, money, or other articles of value enumerated in the definition of swindling, are obtained in such manner as to come within the meaning of theft or some other offense the rules herein prescribed with regard to swindling shall not be understood to take any such case out of the operation of the law which defines any such other offense."

[1, 2] The facts in the case of Anderson v. State, supra, as well as the

reason of the court in affirming the judgment, are illustrative of the point, which seems to have been overlooked in some of the decisions of this court, that, where the facts are such as would warrant a prosecution upon either swindling or theft, the indictment should be for theft. The prosecution should be for swindling only in cases in which the facts would not sustain a conviction for theft, or a conviction under same other provision of the Penal Code penalizing the fraudulent acquisition of property. In the case under discussion, the following remarks are made: "If, however, the facts in this case should be held to constitute swindling under article 1421, yet it cannot be gainsaid that the facts would authorize a jury to find that the possession of the hogs was obtained by fraudulent pretext, with the intent to deprive the owner of their value, and with the intent to appropriate the property to his own use and benefit, and under such circumstances he would also be guilty of theft by fraudulent pretext." Anderson v. State, 77 Tex. Cr. R. 31, 177 S. W. 85, 88.

The decision of this court in the case of Rundell v. State, 90 Tex. Cr. R. 410, 235 S. W. 908, seems authority for the proposition that, where the property obtained upon false pretext is money which the criminal at the time intends to steal, but which the owner parts with on the belief that the money will be used in converting it into a larger sum of money by a represented investment which the criminal had no intention of making, the

offense is theft by false pretext. The opinion of this court written by Judge Lattimore, with the concurrence in the result by the other members of the court, is an interesting history of the transaction, which is summarized as follows: The appellant represented that she had a secret connection with a particular oil driller from whom she would receive inside information about wells which were drilling before they were completed, which information would enable her to double and treble the money turned over to her to be invested in such a venture. Upon such representation the appellant received from Dora Wilson a large sum of money. After the first transaction, the appellant represented to Miss Wilson that her investment had largely increased her funds, and upon such representation acquired from Miss Wilson an additional sum of money to be dealt with in the same manner as above described, and, as an assurance to Miss Wilson against the loss of her money, the appellant executed a note in favor of Miss Wilson for the money received. The note was not paid and was never intended to be paid, so the jury found. The appellant absconded without making restitution of any of the money.

[3] Announcement of the legal effect, on the appeal, which would have resulted from proof that the intent of the owner of the money was to vest title thereof in the Texas Bank & Trust Company does not seem necessary. There is no specific proof that such was the intention. The evidence may support the inference that, while the

owner expected a return of its money on the following morning, It was not essential that it should receive the identical bills which were delivered to the accused. Even if it were established as a fact that in parting with the money it was not the expectation of the owner to have returned to it the identical bills delivered, but merely the equivalent of the bills, it would not, in the judgment of the writer, be fatal to the conviction. This view is supported by the cases cited above, notably Anderson v. State, 77 Tex. Cr. R. 31, 177 S. W. 85; Rundell v. State, 90 Tex. Cr. R. 410, 235 S. W. 908; Dignowitty v. State, 17 Tex. 521, 67 Am. Dec. 670; Hawkins v. State, 58 Tex. Cr. R. 408, 126 S. W. 268, 137 Am. St. Rep. 970, to which may be added Glascow v. State, 50 Tex. Cr. R. 635, 100 S. W. 933.

[4] The soundness of the criticism of the indictment upon the ground that it fails to name the agent of the corporation is met, we think, by many of the decisions of this court to the effect that an indictment naming the corporation is sufficient. Among the cases so holding are Thurmond v. State, 30 Tex. App. 539, 17 S. W. 1098; White v. State, 24 Tex. App. 231, 5 S. W. 857, 5 Am. St. Rep. 879; Osborne v. State, 93 Tex. Cr. R. 54, 245 S. W. 928; Modica v. State, 94 Tex. Cr. R. 403, 251 S. W. 1049; Houghton v. State (Tex. Cr. App.) 32 S. W.(2d) 837.

There was no reason for calling upon the jury in the charge of the court to determine whether any of the other officers or employees of the bank

consented to part with the money in question. The person to whom the representations were made and who delivered the money described the transaction. Some of the other officers of the bank described the workings of the Institution. All of the testimony, so far as it was developed, enforces the conclusion that the appellant's false representations to the teller who delivered the money were the sole cause of its going into his possession. The case of Cantrell v. State, 105 Tex. Cr. R. 560, 289 S. W. 406, and others cited by the appellant, are not deemed relevant.

In Dignowitty v. State, 17 Tex. 521, 67 Am. Dec. 670, the accused had executed a written obligation to pay money to Francis. After Francis died, Dignowitty said to Mrs. Francis that he would like to see the contract. She produced the paper and delivered it to Dignowitty, who put it into the fire and it was burned up. The conviction for theft of the bond was sustained.

In Hawkins' Case, 58 Tex. Cr. R, 408, 126 S. W. 268, 137 Am. St. Rep. 970, the accused represented that he could buy whisky. This statement was made to Terna, who acted upon it and delivered to Hawkins a dollar which Hawkins received with the avowed purpose of buying for Terna a bottle of whisky. Hawkins appropriated the dollar to his own use and was convicted of theft. The delivery of the dollar to Hawking was induced by his false statement that he knew of whisky for sale and would use the dollar in buying whisky

for Terna. In parting with the dollar Terna did not vest the title In Hawkins, but gave it to Hawkins that he might use it for the benefit of Terna as had been represented. Terna did not expect the return of the dollar.

In Ruling Case Law, vol. 17, p. 13, upon the citation of many precedents, the following statement is made: "If a person, with a preconceived design to appropriate property to his own use, obtains possession of it by means of fraud or trickery, the taking under such circumstances amounts to larceny, because in such cases the fraud vitiates the transaction, and the owner is still deemed to retain a constructive possession of the property, and the conversion of it is a sufficient trespass, or, as is sometimes said, the fraud or trick practiced on the owner is equivalent to a trespass.

[5] That in the present case the appellant acquired possession of the money by means of false pretense with the Intention at the time to appropriate the money to his own use and deprive the owner of its value is manifest from the evidence and the finding of the jury. It is obvious that the owner did not intend to vest the title to the property in the appellant. There was no contract of bailment between the owner and the appellant. His representation was to the effect that he had a right to receive the money for the Texas Bank & Trust Company. His pretense that he had a right to receive the money, and his implied assurance that he would not appropriate it

to his own use, are likewise false, and were fraudulently made to deceive the owner and had that effect. We find in the evidence no basis for a charge to the jury that the title to the money passed to the accused. See Modica v. State, supra.

[6, 7] The query on cross-examination of the witness Turner, the teller of the Austin National Bank who delivered the money to the appellant, whether the title to the money passed to the Texas Bank & Trust Company when delivered to the defendant, was calling for a legal conclusion, and its exclusion was not error. The ownership of the property was a question of law to be derived from the proven facts. See Howard v. State, 77 Tex. Cr. R. 185, 178 S. W. 506.

The several bills of exception, as well as the special charges requested, have been carefully examined and considered in the light of the record, also the able brief prepared by the appellant's counsel. A discussion of them in detail is pretermitted, as the remarks above made are deemed sufficient to express the views of the court on all matters presented.

The judgment is affirmed.